89-1495

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

NORTHWEST ADVANCEMENT, INC.,
NANCY LOUISE MARK, Guardian
ad litem for TANYA SUE DOW,
JEFF HENKE, JOE GEER, and TIM COX,
Petitioners,

v.

OREGON Bureau of Labor,
OREGON WAGE AND HOUR COMMISSION, and
MARY WENDY ROBERTS, Commissioner of
the Oregon Bureau of Labor,
Respondents.

ON WRIT OF CERTIORARI TO
IN THE THE COURT OF APPEALS
OF THE STATE OF OREGON

PETITION FOR WRIT OF CERTIORARI

GORDON T. CAREY, JR.*
Attorney at Law
1020 S.W. Taylor, Suite 370
Portland, Oregon 97205
(503) 222-1415

* Counsel of Record for Petitioners

QUESTIONS PRESENTED

1. Do the Regulations of the Wage and Hour Commission Impermissibly Restrict Petitioners' Right of Free Commercial Speech?

Does an administrative rule which purports to regulate the employment of minors but which actually completely prohibits minors under the age of 16 years from canvassing, peddling or soliciting door-to-door, including solicitation of subscriptions for magazines, and canvassing for political and charitable organizations (as well as on peddling of other products) violate the minors' and/or their employer's right of commercial free speech under the First Amendment of the United States Constitution, since the rule is not narrowly tailored to serve the alleged government interest in protecting minors?

2. Do the Regulations of the Wage and Hour Commission Violate the Equal

Protection Guarantees of the Fourteenth Amendment?

Does an administrative rule which prohibits employment of minors for the alleged purpose of protecting them, but in fact completely prohibits the employment of minors under 16 years of age as door-to-door salesmen, canvassers, or peddlers (and restricts such employment of minors ages 16 and 17), and which is specifically intended to prevent minors from soliciting subscriptions for magazines door-to-door, from canvassing for political and religious organizations and from peddling books or other household goods, violate the Fourteenth Amendment guarantee of equal protection of the laws, when the same rule completely exempts those minors who solicit subscriptions for the local newspapers, and their employers, the newspapers, which is the state's largest employer of minors.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings in the court below.

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DECISIONS BELOW

The decisions of the courts below for which review is sought, beginning with the most recent decision of the Oregon Supreme Court, are as follows:

1. Oregon Supreme Court Decision denying review: Northwest Advancement, Inc. et al v. State of Oregon et al, 308 Or. 315, _____ P.2d ____ (1989), App-49.

2. Oregon Court of Appeals Opinion: Northwest Advancement, Inc. et al v. State of Oregon et al, 96 Or App. 133, 772 P.2d 943 (1989), App-19.

3. Northwest Advancement, Inc. et al v. State of Oregon et al, Marion County Circuit Court Case No. 85-1052, App-1, 5.

4. State of Oregon ex rel Roberts et al v. Northwest Advancement, Inc., Multnomah County Circuit Court Case No. 8601-00401, App-6, 14.

THIS COURT'S JURISDICTION

The decision in the Court of Appeals of the State of Oregon was made and entered on April 12, 1989. The Supreme Court of the State of Oregon, the highest court of the State of Oregon, thereafter denied Petitioner's Petition for Review on August 29, 1989. The Oregon Supreme Court denied a Petition for Reconsideration on November 16, 1989, App-50.

On January 26, 1990, this Court granted an extension of time within which to petition for certiorari up to and including March 16, 1990.

Therefore, this Court has jurisdiction to review the decision in question by writ of certiorari under 28 U.S.C. § 1257(a), and is timely under 28 U.S.C. § 2101(c).

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CONSTITUTIONAL PROVISIONS AND ADMINISTRATIVE REGULATIONS INVOLVED

Question No. 1: (Do the Regulations of the Wage and Hour Commission Impermissibly Restrict Petitioners' Right of Free Commercial Speech):

Amendment I of the Constitution of the United States of America provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The regulation of the Wage and Hour Commission of the State of Oregon, as amended by BL 1-1985, provide:

Former OAR 839-21-097(2), current OAR 839-21-097(1):

> No person under 16 years of age:
>
> * * * * *

> (c) May be employed to act as a canvasser, peddler, or "outside salesman" as defined in ORS 653.010(8), from house to house.

OAR 839-21-265:

> (1) No person from 16 to 18 years of age may be employed to act as a canvasser, a peddler, or an "outside salesman" as defined in ORS 653.010(8), from house to house, unless the employer obtains and maintains a validated registration certificate issued by the Bureau of Labor and Industries.

* * * * *

[The rule then sets forth numerous requirements, including the following]:

> (11) In addition to all other rules of the commission, employers employing persons from the age of 16 to the age of 18 to act as a canvasser, peddler or "outside salesman" as defined in ORS 653.010 (8), from house to house shall provide each person, before the person begins work, with an identification card. The identification card shall be on a form prescribed by the Executive Secretary.

The identification card shall include:

(a) A picture of the employee;

(b) The name of the employee;

(c) The name and local address of the employer;

(d) A statement to the effect that the employee is authorized to represent the employer as a canvasser, peddler or "outside salesman";

(e) A statement to the effect that the employer is registered with the Bureau of the Labor and Industries, 1400 S.W. 5th Avenue, Portland, Oregon 97201 (229-5750);

(f) A statement that the card is not valid for any other employer; and

(g) Other information as the Executive Secretary may require to carry out the purpose of this subsection.

(12) Notwithstanding OAR 839-21-067, minors employed to act as a canvasser, a peddler or an "outside salesman", as defined in ORS 653.010(8), from house to house shall not be employed past the

> hour of 9:00 o'clock at night.
>
> (13) The transportation of a minor employed to act as canvasser, peddler, or "outside salesman" to and from the job site shall be provided by the employer and shall occur no later than 9:00 o'clock at night. In the case of a minor who wants to provide his/her own transportation, the employer shall obtain written consent of the minor's parents or legal guardian and maintain such written connsent in the employer's files.

Question No. 2: (Do the Regulations of the Wage and Hour Commission Violate the Equal Protection Guarantees of the Fourteenth Amendment?):

Amendment XIV, Section 1 of the Constitution of the United States of America provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

> wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Former OAR 839-21-107, current OAR 839-21-500, exempts newspaper carriers and newspaper vendors from the regulations of the Wage and Hour Commission set forth above. OAR 839-21-107 provided:

> Minors employed at domestic work and chores in or about private residences and newspaper carriers and neswpaper vendors are not subject to this order.

STATEMENT OF THE CASE

1. Facts

This case involves a challenge to a rule adopted by the Oregon Wage and Hour Commission (the "Commission") in January,

1985, effective March, 1985. The rule, BL 1-1985, was codified primarily as OAR 839-21-097 and OAR 839-21-265. This rule absolutely prohibited minors under 16 years of age from engaging in a common calling, namely door-to-door canvassing, peddling, and outside sales of magazine subscriptions and other household products, and restricted such work for minors 16 and 17 years of age. At the same time, the Commission exempted from these same prohibitions and restrictions minors similarly situated, namely those who are employed by newspapers to solicit subscriptions. The rule, after adoption by the commission, was enforced by the Oregon Bureau of Labor.

Petitioners challenged the rule after its adoption by filing a complaint in the Marion County Circuit Court (in Salem, Oregon), and by filing a motion for summary judgment in that proceeding, seeking, inter alia, to have the rule

declared invalid as unconstitutional. The state responded by filing a cross-motion for summary judgment in Marion County, and by filing a suit seeking a mandatory injunction against Petitioners in Multnomah County Circuit Court (in Portland) to enforce the regulation.[1] At the same time, the state commenced administrative proceedings to revoke Petitioners' right to employ minors, and to impose civil penalties.[2] The within petition seeks certiorari from the decisions of the Oregon Court of Appeals on the consolidated appeals from the decisions of the Marion and Multnomah County Circuit Courts. A separate

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[1]These proceedings are Marion County Circuit Court Case No. 85-1052 and Multnomah County Circuit Court Case No. 8601-00401, consolidated on appeal as Court of Appeals Nos. 41042 and 41109.

[2] These proceedings are Commission Case No. 01-86, and Bureau Case No. CL-01/86 and CL-02/86, and were consolidated on appeal as Court of Appeals No. 42520 and 42899.

petition will be filed from the decision of the Oregon Court of Appeals in the administrative proceedings.

The regulations in this case were promulgated by the Wage and Hour Commission pursuant to ORS 653.305. That statute directs the commission to investigate and establish suitable hours and conditions of employment for minors:

> "The Commission may inquire into wages or hours or conditions of labor of minors employed in any occupation in this state and determine suitable hours and conditions of labor for such minors". ORS 653.305

The Commission held a fact-finding hearing as required by law on October 18, 1984 prior to promulgating its regulation governing door-to-door solicitation by minors. The Commission had invited three witnesses for the purpose of adducing evidence to determine if there was any need to enact special rules for minors

selling door-to-door. Only two of the three witnesses actually showed up and testified. A representative of the Better Business Bureau of Portland testified that his organization had received complaints in other states about for-profit businesses selling candy, cookies, and candles to the public by masquerading as charitable, nonprofit organizations (Rec: 2080-81, 2083).[3] Thus, what he offered was hearsay about activity in other states. When asked to describe how widespread the "problem" was, he stated that he did not have any actual knowledge of the situation and could not present any

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[3] The transcript of the Multnomah and Marion County proceedings was offered and received in evidence as part of the administrative record (Rec: 934-2241). All exhibits in the Circuit Court proceedings are part of the administrative record. Therefore, for ease of reference, all citations in both petitions to the circuit court transcripts shall be to the Administrative Record as "Rec". "TR" shall refer to the transcript of the administrative hearing.

evidence on the situation in Oregon (Rec: 2093-94).

A representative of the Multnomah County District Attorney's Office also testified at the hearing However, when he arrived, he admitted he did not know why he had been asked to appear. He had no knowledge of any problems regarding door-to-door solicitation (Rec: 2098-2106).

The record also reveals that a representative of the Portland Police Department was invited to attend and present testimony concerning "problems" with door-to-door solicitation. However, this representative, a Mr. Bob Bratton, failed to appear at the hearing (Rec: 2097, 2100).

In upholding the rule, the Oregon Court of Appeals held that the regulations were "based upon the determination that that particular activity by minors is sufficiently dangerous." 96 Or App at

143, App-41. This conclusion was based upon their erroneous belief that:

> the Bureau (of Labor and Industries) conducted a public hearing at which representatives of the Better Business Bureau, the Multnomah County District Attorney's Office, and the Hillsboro (sic) Police Department discussed <u>their experiences</u> with minors selling door-to-door. 96 Or App 143 (emphasis supplied), App-43.

Although the Multnomah and Marion County Circuit Courts overruled petitioners' objections to the rule, neither trial court found, as did the Court of Appeals, that the Bureau had adduced evidence in support of the rule at the hearing. The Oregon Court of Appeals was simply incorrect when it stated that the witnesses testified about personal experiences with door-to-door sales by minors; there was no such testimony. This public hearing was indeed the sole basis for the regulation, but no evidence

of specific incidents was ever adduced (TR: 429, 447; Rec: 2018-2020, 2022, 2040-2041).

The Commission, at the same time, had also asked the Bureau to investigate newspaper practices to determine if an exemption from the regulations of the Bureau was warranted for newspapers, and the minors who worked for newspapers as newspaper carriers and subscription solicitors.[4] But, the Bureau failed to perform any investigation. Furthermore, although the Bureau had received complaints about newspapers' employment of minors, it refused to record or investigate such complaints because it considered newspapers exempt from regulation (Rec: Ex. R-24, 797, 884-885, 1264-1265, 1279-1281, 1290).

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[4] Newspaper vending is exempt. See, former OAR 839-21-107, current OAR 839-21-500. The Bureau considers solicitation of subscriptions to be included within the definition of newspaper vending. (Rec: 797, 877, 2005, 2018).

No evidence was ever offered to justify the exemption of minors from not only the rule adopted in 1985 by the Commission prohibiting door-to-door sales, but also from all other child labor laws of the state (Rec: 1196-1197, 1993-1994, 2016-2020, 2031-2032, 2017-2020, 2115-2126). In fact, neither the Bureau nor the Commission has ever investigated the newspapers' employment of minors as carriers and subscription solicitors (Rec: 1281, 2032, 2118-2119, 2121-2122; Ex. 138 to Appeal Nos. 41082 and 41109). The Bureau justified the exemption for an entire industry (newspapers) because "historically minors have always delivered newspapers" (Rec: 797, 884-885, 1281, 2017-2018, 2032, 2115-2125, Ex 138 in Appeals No. 41042 and 41109). But, even assuming that justification is sufficient for newspaper carriers, it does not justify an exemption for minors soliciting newspaper subscriptions.

The Bureau's real intent when it adopted the rule was not to protect minors from overreaching employers, but to protect the public from door-to-door sales. One of the main reasons the Commission adopted BL-1-1985 was to stop door-to-door solicitation of subscriptions for magazines (Rec:806). At the meeting of the Commission to consider the rule, the administrator stated:

> Magazines, that's what really brought all these consumer people together, was the magazine sales, where people come to your door and try to sell you 15 subscriptions. There are minors involved in that....(Rec: 806).

The Bureau also wanted to stop minors from selling household products, like candy, door-to-door. When the mother of one minor who had worked for petitioners called the Bureau to ask why the Commission had adopted regulations forbidding 14 and 15 year-old minors from selling door-to-door, a Bureau representative said: "Actually, that law

was made to put the 'candyman' out of business" [Rec: 2054]. Even the Bureau admitted that at least part of the rule, such as that requiring a minor to wear an identification card, was designed to protect the public (e.g., homeowners) from door-to-door sales, not the minors (Rec: 2029).

Petitioner Northwest Advancement, Inc. (hereinafter, "NWA") is a for-profit, Oregon corporation which sells household products wholesale. NWA does not sell its products directly. Rather, sub-distributors or "crew drivers" purchase the products and resell them on consignment, to salespeople who, in turn, sell them door-to-door to consumers. Many of the salespeople were minors.

Petitioner Jeff Henke is the president and sole shareholder of NWA. Petitioners Joe Geer and Tim Cox are two NWA crew drivers. Petitioner Nancy Marks is the mother and guardian ad litem of one of the

minors who sold NWA products, Tanya Dow. At the time the challenged regulations were enacted, Ms. Dow was 14, and thus absolutely prohibited from engaging in door-to-door sales in Oregon.

Minors who worked for NWA earned good money. They earned an average of $60-$70 per week, and some earned over $100, for 12 to 16 hours of work (TR:296-297; Rec:1769, 1826-1827). While this amount of income would not likely sustain an adult, it is substantial for a teenager. The hours of work (week-nights and weekends) are not attractive to adults, but are not generally objectionable to teenagers.

Prior to March 1, 1985, 14 to 17 year-old minors could sell NWA products door-to-door; but as a result of BL-1-1985, the regulation adopted by the Commission, only 16 and 17 year-old minors could thereafter sell door-to-door in residential areas. Northwest Advancement products could still

be sold by 14 and 15 year-old minors, but only in commercial areas, such as shopping malls, which certainly posed greater risks to the minor than selling in a residential area (Ex.119; Rec: 1714, 1824; TR:309, 462). Thus, minors under 16 who wanted to sell door-to-door after March 1, 1985 could only do so for newspapers, because newspapers were exempt from regulation. Newspapers take full advantage of the supply of minors, including minors under 14. Newspapers employ minors as young as 8 and many between 8 and 12, to solicit subscriptions. The minors are often placed in crews of 20, and are supervised by other minors 14 years of age, and work until 10:00 p.m. Newspapers, unlike NWA, work their minor salespeople an average of 5 nights per week, and some Saturdays, for 25-30 hours per week, but the minors are lucky to make only $5-$10 per week (Rec:1857, 1952, 2046-2047, 2127-2136, 2146, 2156).

It is a fact that 16 and 17 year-old minors tend to be embarrassed about selling door-to-door, as the newspapers well know. Younger minors, particularly those who lack social skills to get jobs at better restaurants or department stores, are happy to sell door-to-door. Selling door-to-door not only gives these minors a chance to earn money, but to learn valuable social and sales skills to get more prestigious jobs later (TR:292, 309; Rec: 1767, 2195-2196).

Minors and parents, and a state counselor, testified in these proceedings that NWA had made a very positive and real difference in the lives of the minors who sold NWA products, including improving their self-confidence, self-image, social skills, and scholastic performance (TR: 289-292; Rec: 1389, 1406-1407, 1412-1413, 1841-1843, 1850, 1857, 1860-1861-1867, 1910, 1912, 1938).

2. Federal Questions Raised Below:

Petitioners raised the federal constitutional questions presented in this Petition for Certiorari in their complaint for declaratory relief in the Marion County Circuit Court. Petitioners Alleged the rule violated plaintiff's rights under the First Amendment and rights to equal protection under the Fourteenth Amendment. Petitioners' Complaint, pp.3-4, Marion County Case No. 85-1052.

The Marion County Circuit Court rejected plaintiff's First Amendment objection. See letter opinion, App-3. The Marion County Circuit Court rejected Petitioners' equal protection argument as follows:

> The most bothersome area is that of exemptions granted by the Defendant to newspaper carriers or vendors. * * * I further conclude that there is a valid classification/distinction between newspaper carriers and other child labor. I therefore do not find any invalid discrimination. Opinion, App-3-4.

Petitioners similarly raised the same federal constitutional questions in their Answer to the State of Oregon's complaint in the Multnomah County Circuit Court. See Answer, p. 5, Multnomah County Case No. 8601-00401.

The Multnomah County Circuit Court granted a permanent injunction against Petitioners, overruling Petitioners' constitutional objection "that the regulations violate right of free speech and that they deny to children under 16 the equal protection of the laws" Opinion, App-12.

Petitioners raised the federal constitutional questions in the Oregon Court of Appeals in their brief at pp. 55-65. The Court of Appeals considered but rejected their constitutional objections at 96 Or App-141-144, App-33-44.

REASONS FOR GRANTING CERTIORARI:

I. Question 1: Do the Regulations of the Wage and Hour Commission Impermissibly Restrict Petitioners' Right of Free Commercial Speech

Petitioners challenge the following state regulations as impermissably restrictive of their right of free commercial speech.

OAR 839-21-097(2):[5]

No person under 16 year of age:

* * * * *

(c) May be employed to act as a canvasser, peddler, or "outside salesman" as defined in ORS 653.010(8), from house to house.

OAR 839-21-265:

(1) No person from 16 to 18 years of age may be employed to act as a canvasser, a peddler, or an "outside salesman" as defined in ORS 653.010(8), from house to house, unless the employer obtains and maintains a validated registration certificate issued by the Bureau of Labor and Industries.

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[5] OAR 839-21-097(2) has now been recodified as OAR 839-21-097(1). BL 6-1988.

* * * * *

(11) ...employers employing persons from the age of 16 to the age of 18 to act as a canvasser, peddler or "outside salesman" ... from house to house shall provide each person, before the person begins work, with an identification card. The identification card shall be on a form prescribed by the Executive Secretary. The identification card shall include:

(a) A picture of the employe;

(b) The name of the employe;

(c) The name and local address of the employer,

(d) A statement to the effect that the employee is authorized to represent the employer as a canvasser, peddler or "outside salesman";

(e) A statement to the effect that the employer is registered with the Bureau of the Labor and Industries, 1400 S.W. 5th Avenue, Portland, Oregon 97201 (229-5750);

(f) A statement that the card is not valid for any other employer; and

(g) Other information as the Execuitve Secretary may require to carry out the purpose of this subsection.

The challenged regulations in this case implicate speech because they absolutely prohibit minors under the age of 16 from engaging in door-to-door solicitation, and

restrict such solicitation by minors 16 to 18 years of age. The regulations themselves state that they apply to a minor engaged as a "canvasser, peddler, or outside salesman" and are thus directed at the minor's speech. In this case, the regulations include minors who sell books, magazine subscriptions, and household products (Rec: 806). Indeed, they also include minors who are employed by political or charitable organizations to solicit political or charitable contributions (TR: 468-469).

Federal courts have held that the First Amendment protects door-to-door solicitation for political and charitable purposes. Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 632-633, 100 S.Ct. 826, 63 L Ed 2d 73 reh den 445 US 972, 100 S Ct 1668 64 L Ed 2d 250 (1980). The Ninth Circuit has held that door-to-door, residential solicitation for the purpose of selling

household consumable products (candy) involves communication and thus implicates constitutionally protected commercial speech. Project 80's, Inc. v. City of Pocatello, 857 F2d 592, amended on rehearing, 876 F2d 711, 714 (9th Cir, 1989).

The First Amendment protects commercial free speech from needless government regulation. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 US 748, 759-60, 96 S Ct 1817, 48 L Ed 2d 346 (1976). Commercial speech is expression which proposes a commercial transaction. Virginia State Board, supra at 762. Residential solicitations by minors for the purpose of selling products propose such transactions and involve commerical speech. The First Amendment rights of minors includes freedom of speech. See, Erznoznik v. City of Jacksonville, 422 US 205, 212-213, 95 S Ct 2268, 45 L Ed 2d 125 (1975); Tinker v. Des

Moines Independent Community School District, 393 US 503, 511, 89 S Ct 733, 21 L Ed 2d 731 (1969). Petitioners contend that the regulations of the Wage and Hour Commission violate the First Amendment by unduly interfering with their rights of commercial free speech.

In reviewing the challenged regulations, the Court of Appeals noted that "nothing in the challenged regulations prevents adults from soliciting door-to-door at any time," 96 Or. App. at 141, App-35, thus implying that minors do not enjoy the same constitutional protections as do adults. The guarantees of the Constitution extend to minors as well as to adults. This Court has held that:

> Constitutiional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.

Planned Parenthood of Missouri v. Danforth, 428 US 52, 74, 96 S Ct 2831, 49 L Ed 2d 788 (1976) (emphasis supplied); see also Tinker v. Des Moines School District, 393 US 503, 89 S Ct 733, 21 L Ed 2d 731 (1969); In re Gault, 387 US 1, 87 S Ct 428, 18 L Ed 2d 527 (1967).

This court set forth a four-prong test to determine whether commercial speech has been unlawfully restrained by a government restriction in Central Hudson Gas and Electric Corp. v. Public Service Commission, 447 US 557, 100 S Ct 2343, 65 L Ed 2d 341 (1981). This four-prong test was restated in the plurality decision of Metromedia, Inc. v. San Diego, 453 US 490, 101 S Ct 2882, 69 L Ed 2d 800 (1980):

> "(1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than

necessary to accomplish the given objective." 453 US at 507.

This court recently clarified the test for determining whether commercial speech has been unduly restricted in Board of Trustees S.U.N.Y. v. Fox, 492 US ___, 109 S Ct ___, 106 L Ed 2d 388, 402-404 (1989) (involving campus regulations prohibiting students from operating "commercial enterprises" in dormitory rooms). Although the government need not employ the least restrictive means necessary to achieve its interests, any government restrictions on commercial speech must be "narrowly tailored" to serve a "significant" government interest. Board of Trustees S.U.N.Y., supra 106 L Ed 2d at 402. The State bears the burden of justifying its restrictions under this test. Central Hudson Gas & Electric Corp. v. Public Service Comm'n, supra; Board of Trustees S.U.N.Y. v. Fox, supra, 106 L Ed 2d at 404.

The Oregon Court of Appeals did not deny the rule affected speech. Rather the court cited Metromedia, Inc., supra, and held that the Metromedia test had been met. Specifically, the Court of Appeals found the fourth element had been met as follows:

> "[The challenged regulations] reach no further than necessary to accomplish the governmental interest, because they permit the employment of minors 16 years of age and older as door-to-door salespersons under certain circumstances, of minors 14 to 16 years of age as salespersons in other circumstances and of adults as salespersons in all circumstances." 96 Or App at 141, App-37-38.

However, the Court of Appeals' conclusory statement that the rule reaches no farther than necessary to accomplish the purported objective of the regulations was no analysis at all. The Court of Appeals failed to analyze the rule to determine if it could be more narrowly drawn. The Court of Appeals held that the regulations were designed to improve the working

conditions of minors, and advanced that interest by prohibiting that employment. However, even that conclusion was suspect because while the purported objective of the challenged rule was to protect minors selling door-to-door, at the same time the Commission adopted the challenged regulation, the Commission also reenacted a naked exemption for newspapers, even though it had no basis for distinguishing one kind of door-to-door sales from another, and admitted as much (Rec: 2063-2079). After all, how can the Commission distinguish between a minor soliciting a newspaper subscription at a residence in the evening from one soliciting a magazine subscription from the same residence? And, to require a minor 16 or 17 years of age to wear an identification card does not advance the purported interest at all. Thus, even assuming arguendo the challenged regulations seek to implement the government's interest in protecting

minors, they do not directly advance that interest because, inter alia, they do not address what is at least as great a risk posed to minors who solicit newspaper subscriptions. The regulations also permit minors 14 and 15 to sell in commercial areas, such as shopping malls, which pose at least as great a risk to their welfare, if not more, than door-to-door residential sales. Most important, however, the regulations are much broader than necessary to serve the government's interest in protecting minors and are not narrowly tailored to meet the government's objectives.

The Commission could have reasonably regulated door-to-door sales. For example, the Commission could have required all those who employ minors door-to-door to register, to provide transportation, and to begin and end such employment within reasonable hours. To completely prohibit such employment,

however, is not even arguably to "narrowly-tailor" regulations.

Where a regulation restricts speech, the administrative convenience of the regulation is irrelevant if the regulation is not also narrowly tailored. White House Vigil v. Clark, 746 F2d 1518, 1531 (DC Cir, 1984).

To the extent that the challenged regulations involve the regulation, rather than the prohibition, of the exercise of speech by minors 16 and 17 years of age, the Court of Appeals should have reviewed the regulations to determine whether they imposed reasonable time, place, and manner restrictions in light of the legislative objectives. See City of Watseka v. Illinois Public Action Council 796 F2d 1547 (7th Cir 1986) aff'd w/o opinion, 479 US 1048 107 S Ct 919, 93 L Ed 2d 972, reh den 107 S Ct 1389 (1987). The Court of Appeals did not do so.

The City of Watseka case involved an ordinance which prohibited all door-to-door solicitation for any purpose whatsoever after business hours and prohibited all door-to-door solicitation on weekends and holidays. The purpose of the ordinance was to prevent fraudulent sales activities and protect residents' right to privacy. The Court of Appeals for the Seventh Circuit concluded that the ordinance violated the First Amendment of the United States Constitution because the city failed to show, inter alia, that there was a significant relationship between the ordinance's time restrictions and the city's asserted interests and that the city had employed the least restrictive means to protect those interests. City of Watseka, supra, 796 F2d at 1555-58. In Project 80's, Inc. v. City of Pocatello, 857 F2d 592 (9th Cir, 1988), amended on rehearing, 876 F2d 711 (9th Cir, 1989), the Ninth Circuit has

now struck down two Green River ordinances in towns in Idaho under the First Amendment, stating that the existence of effective alternatives measures to serve the town's interests preclude the broad prohibition by such ordinances of the commercial speech inherent in residential door-to-door solicitation. Here, as in Project 80's, Inc., supra, effective alternatives exist to the broad prohibitions and restrictions upon minors' commercial speech. Under Board of Trustees S.U.N.Y., supra, 106 L Ed 2d at 404, the free speech guarantee of the First Amendment requires a more "reasonable fit" between the regulation and the state's objectives. In Board of Trustees, S.U.N.Y. v. Fox, supra, the State University of New York's campus regulations prohibited students from operating "commercial enterprises" in dormitory rooms. Students and company representatives arrested for and prevented

from holding a "tupperware" party challenged the regulations. This Court remanded the matter for a full evidentiary hearing to determine if the regulations "substantially burdened more speech than necessary to further the government's legitamate interests." Board of Trustees, S.U.N.Y., supra, 106 L. Ed.2d at 402, citing Ward v. Rock Against Racism, 491 U.S. ___, ___, 109 S. Ct. ___, 105 L.Ed.2d 661 (1989). Flat prohibitions and unnecessary restrictions do not satisfy the requirements of Board of Trustees S.U.N.Y., supra, and are unjustified.

Former OAR 839-21-097(2)(c) [current OAR 839-21-097(1)(c)] purports to protect the welfare of 14 and 15 year-old minors by prohibiting them from employment in door-to-door residential sales. However, as stated above, there are narrower means which would protect such minors without abridging their rights to commercial free speech. For example, the Wage and Hour

Commission could have promulgated regulations which limit the number of such minors who can work on a crew, require that a licensed adult accompany each crew and remain within one block of them as they go door-to-door, and establish reasonable restrictions on the hours they may work, such as 4:00 to 9:00 p.m. on weekdays, and requiring return transportation. Establishing reasonable regulations over door-to-door solicitation by minors, in conjunction with the power to penalize employers who violate the regulations, would narrowly tailor the restrictions to the "reasonable fit" with the government's stated objectives, as required by Board of Trustees S.U.N.Y., supra, 106 L Ed 2d at 404.

Here, there is no doubt that a narrower regulation would accomplish the state purpose and still allow minors to exercise their First Amendment rights. The regulations at hand are unconstitutional

because they unduly restrict minors rights to commercial free speech under the First Amendment of the United States Constitution.

The regulations at issue are also overbroad because they flatly prohibit minors under the age of 16 from engaging in commercial speech, by prohibiting them from being employed to canvas, peddle, or sell door-to-door. In Johnson v. City of Opelousas, 658 F2d 1065, 1074 (5th Cir, 1981), the fifth circuit held that a city curfew ordinance that prevented minors under 18 from being on the streets between 11:00 p.m. and 4:00 a.m. was unconstitutionally overbroad. The court held that the ordinance, to the extent that it implicitly prohibited minors from engaging in protected First Amendment activities, including legitimate employment, was overbroad and violated the First Amendment rights of minors. Johnson v. City of Opelousas, supra at 1072. The

prohibitions against employing minors under 16 as door-to-door salespeople and restricting 16 and 17 year-old minors are explicit, unlike the implicit prohibition against employment resulting from the curfew ordinance in Johnson. In addition, the prohibition includes employment of minors to solicit door-to-door for books, magazine subscriptions and for charitable or political organizations (Rec: 806; TR: 468-469). These regulations would clearly be unconstitutional under the First Amendment if directed solely at religious, charitable, and/or political speech. Village of Schaumberg v. Citizens for a Better Environment, 444 US 620, 631 (1980). The regulations, therefore, are overbroad because they abridge the exercise of protected speech by minors.

This court should grant certiorari because the decision of the Oregon Court of Appeals, which the Oregon Supreme Court declined to review, is in conflict with

the decision of this court and the decisions of the federal courts of appeals cited above on an important federal question.

II. Question 2: Do the Regulations of the Wage and Hour Commission Violate the Equal Protection Guarantees of the Fourteenth Amendment

Petitioners further challenge the regulations of the Wage and Hour Commission on the grounds that they violate petitioner's rights to equal protection under the Fourteenth Amendment of the United States Constitution. Wage and Hour Commission's regulations exempt newspaper vendors and carriers from administrative regulation. Former OAR 839-21-107[6] provided:

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[6] Current OAR 839-21-500, effective April 12, 1988, exempts the employers of minors engaged in certain work, rather than the minors themselves. It provides:

> "The provisions of OAR 839-21-001 to 839-21-500 do not apply to employers employing minors in the following work or occupations:

"Minors employed at domestic work and chores in or about private residences and newspaper carriers and newspaper vendors are not subject to this order."

Here the classifications created by the regulations and the exemptions therefrom discriminate between minors who choose to sell newspaper subscriptions door-to-door and those similarly-situated minors who choose to solicit magazine subscriptions door-to-door, sell books or other household goods, or, for that matter, those who are employed to solicit for charitable and political organizations. Where, as here, a legislative classification discriminates with respect

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(1) Domestic work or chores in or about a private residence.

(2) Newspaper carrier.

(3) Newspaper vendor."

In the Court of Appeals' opinion, the court refers to the exemption as former OAR 839-21-107, but makes no mention of the current exemption, OAR 839-21-500. The exemption was not repealed but merely recodified, in April 1988.

to the exercise of a fundamental right, the state must show the law is necessary to promote a compelling state interest. Sklar v. Byrne, 727 F2d 633, 636-637 (7th Cir, 1984); Eisenstadt v. Baird, 405 US 438, 447, n 7, 92 S Ct 1029, 31 L Ed 2d 349 (1972).

A right is fundamental where it is explicitly or implicitly guaranteed by the constitution. San Antonio Independent School District v. Rodriquez, 411 US 1, 33-34, 935 Ct 1278, 36 L Ed 2d 16 (1973). Free speech is clearly a fundamental right. Regan v. Taxation with Representation, 461 US 540, 547, 103 S Ct 1997, 76 L Ed 2d 129 (1983). ("Statutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right, such as freedom of speech").[7] These rights extend

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[7]In addition, this court has also held the right to work is protected. Truax v. Raich, 239 US 33, 41, 36 S Ct 7, 60 L Ed 131 1915).

to minors. In re Gault, 387 US 1, 13, 87 S Ct 1428, 18 L Ed 2d 527 (1967).

Classification that paralyzes the exercise of a fundamental right must be narrowly drawn to promote only that interest or it violates equal protection. See Carey v. Population Services International, 431 US 678 686, 97 S Ct 2010, 52 L Ed 2d 675 (1977); Shapiro v. Thompson, 394 US 631, 634, 89 S Ct 1322, 22 L Ed 2d 600 (1969). Here, former OAR 839-21-097(2)(c), current OAR 839-21-097(1)(c) and OAR 839-21-265 infringe on Northwest's and the crew drivers' fundamental rights.

The Court of Appeals refused to apply strict scrutiny to the challenged regulations, stating "[b]ecause no fundamental interests are addressed by the challenged regulations, they need only have a rational basis to withstand Fourteenth Amendment scrutiny." 96 Or App

at 144, App-44. In so holding, the Court of Appeals ignored the precedents set by this Court, cited above.

Since these regulations involve a fundamental right, a compelling state interest must be served before classifying Northwest and minors employed by it differently from those similarly situated, namely newspapers and the minors employed by newspapers. Furthermore, even if some compelling state interest is served, the classification must be narrowly drawn to promote only that interest. See Carey v. Population Services International, supra at 686. Equal protection guarantees apply to regulatory agencies as well as the legislature. Moose Lodge No. 107 v. Irvis, 407 US 163, 179, 92 S Ct 1965, 32 L Ed 2d 627 (1972).

Former OAR 839-21-107, current 839-21-500, grossly favors newspapers by exempting them from rules regulating child labor, and also favors employers of minors

other than door-to-door sellers because the regulations are significantly more onerous in respect of door-to-door sales.[8] These regulations classify differently two industries similarly situated. There is no difference between a magazine publisher who employs a minor to solicit a subscription and a newspaper publisher who employs a minor to solicit a subscription. The classification is not necessary to promote a compelling state interest in protecting minors; in fact, the classification defeats it. Assuming, arguendo, that the regulations do promote a compelling state interest, they could

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[8]The state's rules also favor other employers, such as fast food employers and gas stations (i.e., fast food employers can employ the minor at any hour, and are not required to provide return transportation). Arguably, however, those employers are not similarly situated, but, clearly, newspapers who employ minors to solicit subscriptions are no different than magazines who employ minors to solicit subscriptions.

clearly have been more narrowly drawn. See, arguments, supra.

Even if fundamental rights are not involved, the discriminatory classification must still bear a rational relationship to a legitimate state interest. Campell v. Mincey, 413 F Supp 16, 22 (ND Miss, 1975), aff'd, 542 F 2d 583 (5th Cir, 1976). The Fourteenth Amendment denies states the power to discriminate between persons on the basis of criteria unrelated to the purpose of the statute. Eisenstadt v. Baird, supra at 447 n.7; Reed v. Reed, 404 US 71, 75-76, 92 S Ct 251, 30 L Ed 2d 225 (1971). A statutory classification must be reasonable, not arbitrary, and rest on a ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike. Eisenstadt v. Baird, supra at 447. In Eisenstadt v. Baird, the Supreme Court

held that a Massachusetts statute prohibiting distribution of contraceptives to all persons, except married persons, violated the equal protection clause of the Fourteenth Amendment because it was not rationally related to a legitimate state interest in encouraging continence and discouraging illicit sexual activity in that the statutory classification had only a marginal relation to the state's asserted goals. Eisenstadt v. Baird, supra at 448.

Former Regulation 839-21-107, current 839-21-500 here discriminates against NWA and the minors just as the Massachusetts statute discriminated against unmarried persons in Eisenstadt v. Baird. The substantive regulations [former OAR 839-21-097(2)(c) current 839-21-097(1)(c), and OAR 839-21-265] also impose unreasonable burdens on employers of door-to-door sellers (other than newspapers), not imposed on newspapers. If the state's

asserted goal is protecting the safety of minors, it abandoned that goal by exempting the largest employer of minors going door-to-door, newspapers, and 14 and 15 year-old minors selling in commercial areas.

In Aladdin's Castle, Inc. v. City of Mesquite, 630 F2d 1029 (5th Cir 1980), rev'd in part on the grounds and remanded, 455 US 283, 102 S Ct 1070, 71 L Ed 2d 152 (1982); former opinion adhered to, 713 F2d 137 (5th Cir); reh den en banc 718 F2d 1097 (5th Cir); motion to recall judgment den, 464 US 927, 104 S Ct 329, 78 L Ed 2d 300 (1983), a city ordinance made it unlawful for a coin-operated amusement center to allow minors under the age of 17 to play the machines unless accompanied by a parent or guardian. The Fifth Circuit Court of Appeals concluded that the age restriction in the ordinance had no rational basis in light of the city's

alleged interest in eliminating truancy. 630 F2d at 1039-40.

In this case, the distinction between minors who work for newspaper publishers and those who work for magazine publishers or other door-to-door sellers, or, for that matter, between minors 16 and 17 years old and minors under 16, has no rational basis in light of the state's asserted interest in protecting minors in employment. ORS 653.320(1) prohibits the employment of minors under the age of 14 during the school term. The enabling legislation, therefore, does not establish or recognize the distinctions made in the challenged regulations. And, the history of the challenged regulations establishes no basis in fact for any distinctions. No evidence was presented at the hearing held prior to promulgation of the challenged rule which established any basis for distinguishing minors aged 14 and 15 from the 16 and 17 year-old minors who are

permitted to be employed in door-to-door canvassing and sales, or for distinguishing minors who sell for newspaper publishers from those who sell for magazine publishers, charitable or religious organizations, or distributors of <u>other</u> household products.

The challenged regulations in this case do not apply across the board to organizations which sell or canvass door-to-door, but create an exemption from regulation for employers who sell newspapers.

In reviewing the challenged regulations, the Court of Appeals found that:

> The Bureau had conducted a public hearing at which [witnesses] discussed their experiences with minors selling door-to-door. * * * no complaints about newspaper carriers or newspaper vendors were received. We conclude that the exemption of newspaper carriers and vendors in OAR 839-21-107 had a rational basis in the light of the enabling statute's purpose of promoting safe working conditions

for minors." 96 Or App at 143, App-43.

First, assuming, arguendo, that the above statement is correct, it does not constitute a rational basis for a legislative distinction since the distinction is not rationally related to any legitimate state interest in protecting minors since there were many employers of minors other than newspapers covered by the rule against whom no complaint had been made. Second, and most importantly, the statement above is simply incorrect, and contrary to the admission of the state. The state admitted it had complaints about newspapers' employment of minors, but the state had no records of the complaints because the state refuses to process or handle such complaints because it has exempted newspapers. For example, the Bureau of Labor acknowledged that intake personnel are directed to tell any party complaining about newspaper

practices that the Bureau has no "authority" over newspaper employers. As a result, the Bureau has no records of how many complaints it received, or the substance of any complaints. The administration admitted, however, that the Bureau does receive such complaints. (Rec:1265, 1290, 2015-2027). Neither trial court judge found that newspapers were free of such complaints. Finally, although specifically directed to investigate newspapers during the time when the challenged rule was being promulgated, the Bureau failed to investigate newspapers' employment of minor at all.

The Court of Appeals' determination that witnesses at the hearing on adoption of the rule established a rational basis for the distinction (96 Or App at 143) is not supported by the record. The two witnesses who appeared offered no evidence to support a determination that door-to-

door sales should be prohibited, or even specially regulated. The agency admitted that the only evidence it had to support the rule was the testimony of the witnesses at the hearing (TR: 429, 447, 478; Rec: 1196-1197, 1231,-1232, 2018-2020, 2022, 2040-2041).

The record establishes that the exemption for newspaper carriers and vendors is actually based on agency inertia in the face of the newspaper's political influence (Rec: 801; Rec: 2061-2062). The creation of such a special exemption is precisely the type of law the Equal Protection Clause of the Fourteenth Amendment protects against. The Fourteenth Amendment denies states the power to discriminate on the basis of criteria unrelated to the purpose of the statute. Eisenstadt v. Baird, supra at 447, n.7. The Fourteenth Amendment guarantees that persons similarly situated must be treated equally. Eisenstadt v.

Baird, supra, at 447. The alleged purpose of OAR 839-21-097(2)(c) and OAR 839-21-265 is to protect minors. There is no dispute that NWA would be exempt if the minors solicitated newspapers instead of other products (Resp. Br. in the Court of Appeals 56). Neither the Court of Appeals nor the State can explain how selling magazines as opposed to newspapers relates to the safety of the minors because there is no relation.

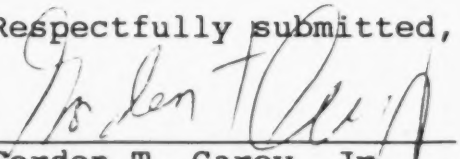
The court should grant the petition for certiorari because the decision of the Court of Appeals, which the Oregon Supreme Court declined to review, is in conflict with the decisions of this court and the federal courts of appeal cited above on an important point of federal law.

CONCLUSION

This court should grant the petition because the questions above deal with

important constitutional rights of minors. The court has not yet fully dealt with the questions set forth above in the context of minors' rights of commercial free speech.

Respectfully submitted,



Gordon T. Carey, Jr.
OSB # 77133
Attorney for Petitioner

On June 6, 1986, the Marion County Circuit Court Judge Ertsgaard issued his letter opinion in the case filed by Petitioners challenging the state's regulations:

LETTER OPINION

Dear Counsel:

The above case came before the Court on Defendant's motion for summary judgment and Plaintiffs' counter motion for summary judgment. After arguments the matter was continued under advisement. Thereafter Plaintiff filed a motion to supplement the record with further argument and submitted an affidavit of counsel in support of the motion which contained the further argument. Defendant responded with objection to the motion and with reply to the arguments. All of these matters were read and have been considered.

Plaintiffs contend that their rights have been violated by certain statutes and administrative rules which relate to employment of minors, particularly for door-to-door solicitation or sales of household products by minors under the age of 16. The arguments include allegations of violation of Plaintiffs' rights to "commercial free speech", improper (i.e. discriminatory) classification of Plaintiffs and an argument that the rules/regulations of Defendant are "ultra vires".

I have finally had opportunity to review and study the rather voluminous memoranda filed by counsel. First of all I think that Plaintiff has demonstrated and established that the actions of Defendant amount to orders in non-contested cases which are reviewable by this Court and that such review can

include review of the validity of the applicable statutes and rules.

Next, it is my interpretation and opinion of the legislation that the rules and regulations adopted by Defendant are within the statutory authority. I therefore reject Plaintiffs' contention of ultra vires. I also believe that Plaintiff's "free speech" argument is not well taken.

The most bothersome area is that of the exemptions granted by the legislature and the Defendant to newspaper carriers or vendors. I conclude that these exemptions are severable and if invalid do not require invalidation of all of the general statutes and rules restricting child labor. I further conclude that there is a valid classification/distinction between newspaper carriers and other child labor. I further conclude that there is a valid

classification/distinction between newspaper carriers and other child labor I therefore do not find any invalid discrimination.

In summary my review leads me to the general conclusion that the statutes in question and the rules adopted are valid as applied to the Plaintiffs. I therefore conclude and find that Defendant's motion for summary judgment should be granted and that Plaintiffs' motion should be denied. It will be so ordered. Counsel for Defendant shall prepare the order for signature.

Very truly yours,

DUANE R. ERTSGAARD
Circuit Judge

On July 14, 1986, the Marion County Circuit Court entered judgment based on the foregoing opinion:

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

NORTHWEST ADVANCEMENT, INC., and NANCY LOUISE MARK, Guardian ad litem for TANYA SUE DOW,	)	
Plaintiffs,	)	No. 85-1052
v.	)	
	)	JUDGMENT
STATE OF OREGON, Bureau of Labor, Wage and Hour Division,	)	
Defendant.	)	

This matter came before the court on defendant's motion for summary judgment and plaintiffs' cross motion for summary judgment. The court granted defendant's motion for summary judgment and denied plaintiffs' cross motion for summary judgment, which finally disposed of all claims pending between the parties.

IT IS ORDERED AND ADJUDGED that defendant is awarded judgment denying plaintiffs declaratory relief which they seek, and defendant is awarded its costs and disbursements herein.

DATED this 14th day of July, 1986.

/s/ Duane R. Ertsgaard
DUANE R. ERTSGAARD
Circuit Court Judge
Submitted by Janet L. Prewitt

* * *

After a hearing on a motion for a preliminary injunction, Multnomah County Circuit Court Judge Herrel issued the following letter opinion on April 7, 1986:

LETTER OPINION

Dear Counsel:

Plaintiff has filed this proceeding seeking to enjoin defendants from engaging in certain conduct in violation of Oregon Child Labor laws and the regulations

issued thereunder. Defendants are Northwest Advancement, Inc. ("NWA"), its owner and Chief Executive Officer, Mr. Jeff Henke, two individual named defendants, Messrs. Joe Geer and Tim Cox, and all other persons controlled by NWA. The matter now before the Court is a motion for a preliminary injunction under ORCP 79.

Defendants deny that the facts warrant any relief. In addition they assert numerous legal theories any one of which they contend would constitute a complete defense.

After this hearing had concluded on February 24, 1986, plaintiff moved to reopen the hearing to present additional evidence. That motion is denied, and the Court has considered only the evidence presented at the hearing in Court.

Upon consideration of all the evidence, the briefs and the argument of counsel, I find in favor of the plaintiff. A preliminary injunction will therefore issue restraining and enjoining defendants and the officers, agents, employees, distributors and crew chiefs of NWA from engaging in the eight types of illegal conduct specified in plaintiff's motion for a preliminary injunction.

The evidence clearly establishes that NWA and its "crew chiefs" have committed numerous violations of regulations promulgated by the Wage and Hour Commission regulating the employment of minors as outside sales people. Defendants NWA and Mr. Henke acknowledge that certain violations occurred, primarily involving activities of defendants Geer and Cox. Indeed most of the violations upon which plaintiff's evidence turns involved crews supervised

by Messrs. Geer and Cox. Nevertheless, I find that defendants NWA and Henke also bear responsibility for the latter violations as well as others in which they were directly involved.

The children who are employed as outside sales people are employees and not independent contractors for purposes of the Child Labor Laws. They believe themselves to be employed by NWA. All documents concerning the relationship are in the name of NWA. All activities are carried on in the name of NWA. Most important, the children are almost entirely controlled by NWA's crew chiefs in the course of their outside selling. The skill and investment tests in determining whether an employment relationship exists have also been satisfied.

The crew chiefs themselves are also employees of NWA at least insofar as the Child Labor Laws are concerned. Whether in some disputes as between themselves and NWA they might be considered "independent contractors" is not relevant. The fact is that the crew chiefs act as agents of NWA for purposes of carrying on the work resulting in the employment of the children by NWA.

This case is on all fours factually with Thomas v. Brock and Brock v. Global Home Products, Inc., 617 F. Supp. 526 (1985). I completely agree with the holding in that case by Judge McMillan of the U.S. District Court for the Western District of North Carolina.

I hold that the Wage and Hour Commission has authority to regulate the activities of children engaged in outside sales and

that the regulations sought to be enforced here fall within that authority.

I further hold that the plaintiff has authority to seek injunctive relief in addition to its administrative authority and the existence of criminal sanctions. This is because the authority to revoke permits and the authority to impose fines and institute criminal proceedings for each separate violations do not afford sufficient protection to the public and to the children so as to enable effective enforcement.

In this case, it appears that plaintiff will be entitled to the relief demanded in the complaint. I also find that continued violations of the law are likely unless this injunctive relief is granted. Finally, the issuance of injunctive relief is in the public interest.

Defendants argue that the exemption from regulation which is enjoyed by newspaper carriers and sales people is an arbitrary and discriminatory exemption and the regulations are void by reason of selective enforcement. I find no merit in this contention. I also find no merit in defendants' other two contentions, namely that the regulations violate rights of free speech and that they deny to children under 16 the equal protection of the laws.

The preliminary injunction will issue as prayed for and the Court will set the amount of security required of plaintiff under ORCP 82A(1)(a) at $25,000. If defendants believe that this amount is insufficient I will hold a hearing on that issue should they so request.

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Ms. Rodgers may prepare and submit an appropriate order in conformance with this opinion.

Very truly yours,

/s/ STEPHEN B. HERREL
Stephen B. Herrel

* * *

On April 30, 1986, Judge Herrel issued a preliminary injunction in accordance with the foregoing letter opinion, and after a further hearing, Judge Herrel issued a permanent injunction as follows:

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON, ex rel MARY WENDY ROBERTS, Commissioner of the Oregon Bureau of Labor and Industries, and the Wage and Hour Commission of the State of Oregon,	
Plaintiff,	No. A8601-00401
v.	JUDGMENT
NORTHWEST ADVANCEMENT, INC., JEFF HENKE, JOE GEER, and TIM COX,	
Defendants.	

This matter came before the court for trial on July 21, 1986. At that time, the parties submitted the record of the hearings, including exhibits, on the preliminary injunction (which commenced February 14, 1986) and offerred (sic) additional evidence in the form of testimony and exhibit. The court considered the entire record, including all the exhibits, and testimony of

witnesses who testified on July 21, 1986 and those whose testimony from the preliminary injunction hearing was submitted in exhibit form, the pleadings and memoranda of counsel. Based on the foregoing record, the court finds that plaintiff is entitled to have a permanent injunction entered which enjoins defendants from engaging in continued violations of statutes and regulations concerning employment of minors by defendants. This Judgment is also based upon the findings of fact, conclusions of law, and holdings contained in the attached letter to counsel dated April 7, 1986. That letter is thus expressly made a part of this Judgment except that no surety bond is required.

-IT IS HEREBY ORDERED:

Defendant Northwest Advancement, Inc., its officers, agents, employees, distributors, and crew chiefs, including

but not limited to Jeff Henke, Joe Geer and Tim Cox, are permanently enjoined and shall refrain from the following:

1. Employing minors under the age of 14 during the term when public schools of the town, district, or city in which they reside are in session, as such employment is in violation of ORS 653.320(1) and OAR 839-21-246(4)(a).

2. Employing minors under the age of 16 as outside salesmen or peddlers, working from house to house, in violation of OAR 839-21-097(2)(c) and 839-21-265(1).

3. Employing minors between the ages of 16 and 18 to work, from house to house, after 9:00 p.m. in violation of ORS 653.315(1) and (2) and OAR 839-21-265(12).

4. Employing minors under the age of 16 for more than 10 hours in any day. ORS 653.315(1).

5. Transporting or suffering or permitting the transporting of minors under the age of 18 across the Oregon state line to work for Northwest Advancement, Inc., in violation of OAR 839-21-265(14).

6. Transporting (or causing or suffering or permitting the transporting of) minors selling from house to house, to any location without providing transportation back to the place where they were picked up, no later than 9:00 p.m., in violation of OAR 839-21-265(13).

7. Employing minors under the age of 18 who do not have a work permit, as required by ORS 653.315(2)(d), OAR 839-21-215(1) and OAR 839-21-246; permits must be obtained prior to employment.

8. Employing minors without employer certification issued by the Oregon Bureau of Labor and Industries in violation of ORS 653.310, OAR 839-21-077(1) and OAR 839-21-220 which require that these

certifications be obtained within 48 hours of the employment of minors under the age of 18.

9. Employing minors to peddle products door-to-door, outside without identification cards as required by OAR 839-21-265(11).

This is a final judgment and permanent injunction.

DATED this 29th day of October, 1986

/s/ Stephen B. Herrell
STEPHEN B. HERRELL
Circuit Court Judge

* * *

Upon Appeal by Petitioners, the Oregon Court of Appeals issued the following opinion on April 12, 1989. It is reported at 96 Or App 133,772 P2d 943 (1989):

IN THE COURT OF APPEALS OF

THE STATE OF OREGON

NORTHWEST ADVANCEMENT, INC., and NANCY LOUISE MARK, Guardian ad litem for TANYA SUE DOW,

Appellants,

v.

STATE OF OREGON, Bureau of Labor, Wage and Hour Division,

Respondent.

STATE OF OREGON, ex rel MARY WENDY ROBERTS, Commissioner of the Oregon Bureau of Labor and Industries, and the WAGE AND HOUR COMMISSION of the State of Oregon,

Respondents,

v.

NORTHWEST ADVANCEMENT, INC., JEFF HENKE, JOE GEER and TIM COX,

Appellants.

(Marion County 85-1052, Multnomah County 8601-00401; CA A41042 (Control), CA A41109 (Cases Consolidated)

DEITS, J.

Appellants in these consolidated appeals seek review of two judgments entered in separate counties. In Northwest Advancement v. Bureau of Labor, the Marion County Circuit Court entered a summary judgment for the state in appellants' declaratory judgment action challenging the validity of regulations promulgated by the Oregon Wage and Hour Commission (WHC). In State ex rel Roberts v. Northwest Advancement, the Multnomah County Circuit Court granted the state's request for a permanent mandatory injunction requiring appellants to comply with the challenged regulations. We affirm both judgments.[1]

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[1] Appellants also challenge two final orders issued by the Bureau and WHC that imposed civil penalties for violations of the regulations and revoked their right to hire minors in the future. That administrative law review is Northwest Advancement v. Wage and Hour Comm., _____ OR App _____, _____ P2d _____ (decided this date).

Appellant Northwest Advancement Inc. (NWA) is an Oregon corporation engaged in the wholesale distribution of candy and various household products. Appellant Henke is NWA's president and sole shareholder. NWA distributes its products primarily through door-to-door sales by minors. The minors are recruited by Henke and his "crew chiefs," whom Henke himself recruits. Appellants Geer and Cox were both NWA crew chiefs and were responsible for transporting minors to and from neighborhoods where they sold NWA's products.

In 1985, WHC promulgated administrative rules regulating the employment of minors as canvassers, peddlers or outside house-to-house salesmen. Appellants NWA and Nancy Louise Mark, guardian ad litem for one of the minors working for NWA, filed an action in Marion County seeking a declaratory judgment that the regulations

were invalid.[2] While that action was pending, the Bureau of Labor and Industries (Bureau) filed a separate action in Multnomah County seeking preliminary and mandatory injunctions requiring NWA and its crew chiefs to comply with the regulations. The Marion County Circuit Court entered a summary judgment for the state, and the Multnomah

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[2] At issue in these appeals are OAR 839-21-097(1)(c), which prohibits the employment of minors under 16 years of age as door -to-door salespersons; OAR 839-21-265(1)-(10), which requires employers to register with the Bureau any minors ages 16-18 who are employed in those capacities; OAR 839-21-265(11), which requires such minors to wear identification cards bearing certain information; OAR 839-21-265(12), which prohibits employment of such minors after 9 o'clock at night; OAR 839-21-265(13), which requires employers to provide such minors with transportation home by 9:00 at night; OAR 839-21-265(14), which prohibits employers from transporting such minors to another state without the written consent of their parents; and former OAR 839-21-107, which, at the time these actions were commenced, exempted from coverage of the other rules minors employed as newspaper carriers or newspaper vendors.

County Circuit Court granted the state's request for an injunction. Appellants challenge both judgments.

Appellants first argue that the Multnomah court erred in concluding that the NWA sales operation was governed by the statutes and administrative rules relating to the employment of minors, because NWA does not "employ" minors as that term is used in ORS 653.305,[3] the

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[3] ORS 653.305 provides:

"(1) The commission may at any time inquire into wages or hours or conditions of labor of minors employed in any occupation in this state and determine suitable hours and conditions of labor for such minors.

"(2) When the commission has made such determination, it may issue an obligatory order in compliance with ORS 183.310 to 183.550.

"(3) After such order is effective, no employer in the occupation affected shall employ a minor for more hours or under different conditions of labor than are specified or required by the order; but no such order nor the commission shall authorize or permit the employment of any minor for more hours per

enabling statute for the challenged regulations. They assert that the minors and crew chiefs are independent contractors and are, therefore, exempt from the regulations. We disagree. Although appellants and the state differ over the meaning of "employ" and "employer" as used in ORS 653.305,[4] under either party's definitions of those terms the minors in this case were employees.

ORS 653.010, which the state argues applies to ORS 653.305, defines "employ" as "suffer or permit to work," and

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day or per week than the maximum fixed by law or at times or under conditions prohibited by law."

[4] The state argues that the definitions of "employ" and "employer" contained in ORS 653.010, the language of which was taken from the federal Fair Labor Standards Act, apply to ORS 653.305. On the other hand, appellants argue that those definitions do not apply because the clause preceding ORS 653.010 begins with, "[a]s used in ORS 653.010 to 653.261 * * * ." They argue instead that the common law distinction between an employee and an independent contractor should control.

"employer" as "any person who employs another person." Although no Oregon cases have further refined those terms, federal regulations and case law interpreting the same terms under the Fair Labor Standards Act, after which most of ORS chapter 653 is patterned, are instructive. For example, 29 CFR § 570.113, relating to the definitions of "employ" and "employer" for purposes of child labor law under FLSA, states:

> "The nature of an employer-employee relationship is ordinarily to be determined not solely on the basis of the contractual relationship between the parties but also in the light of all the facts and circumstances. Moreover, the terms "employer" and "employ" as used in the Act are broader than the common-law concept of employment and must be interpreted broadly in the light of the mischief to be corrected. Thus, neither the technical relationship between the parties nor the fact that the minor is unsupervised or receives no compensation is controlling in determining whether an employer-employee relationship exists * * *."

In Wirtz v. Keystone Readers Service, Inc, 282 F Supp 871 (SD Fla), aff'd 418 F2d 249 (5th Cir 1968), the court addressed an employment scheme nearly identical to the one in this case. In Wirtz, a magazine distributor hired "student salesman" to work after school and on weekends soliciting magazine subscriptions door-to-door. The principal officer and shareholder of the defendant corporation either interviewed and trained the minors himself or supervised a "student manager" who did. During the training process, the minors had to memorize a sales speech that he provided. After reporting to the defendant's office each day, the minors were transported in cars driven by "student managers" to designated neighborhoods, where they would "fan out" and solicit subscriptions. At the end of the day, the minors met the "student managers" at a designated place

and then were transported back to the defendant's office. There, the minors would turn in their subscriptions and receive a commission based on the volume of sales. On those facts, the court concluded that the minors were employees for the purposes of FLSA. The court observed that "[w]hen work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act." 282 F Supp at 874. We conclude that, if the FLSA definitions of employ and employer contained in ORS 653.010 apply in this case, the minors and crew chiefs are employees.

However, even assuming that appellants are correct in their assertion that the FLSA definitions incorporated in ORS 653.010 do not apply to ORS 653.305, and that we therefore must turn to the common

law distinction between employees and independent contractors, we conclude that the minors and crew chiefs in this case were still employees. At common law, the question of whether an independent contractor relationship exists focuses primarily on whether the worker is subject to the principal's direction and control. See, e.g., Restatement (Second) Agency, § 2(3) (1958); Nordling v. Johnston, 205 Or 315, 332, 283 P2d 994 (1955). In this case, both the crew chiefs and the minors were subject to the direction and control of Henke and, therefore, of NWA. Henke interviewed and trained the minors in their sales techniques, giving them standardized sales speeches to memorize. He assigned the crew chiefs specific territories in which to operate. The minors did not choose the neighborhoods in which they sold NWA products, but rather were driven to and from areas selected by

Henke and the crew chiefs. Although the crew chiefs and the minors were paid on commission and not on an hourly basis, neither was at financial risk, because they did not purchase the product in advance and were allowed to return all unsold inventory. Finally, the NWA logo was printed on all advertising materials used by the minors to promote sales. We conclude that both the minors and the crew chiefs are employees for purpose of ORS 653.305.

Appellants next argue that both courts erred in concluding that the Bureau did not exceed its authority under ORS 653.305(1) when it promulgated OAR 839-21-0097(1)(c), which prohibits the employment of minors under 16 years of age as door-to-door salespersons.[5] ORS

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[5] Appellants also argue that the Bureau exceeded its authority under ORS 653.305(1) when it promulgated former OAR 839-21-107, which exempted from regulation

653.305(1) provides that WHC may at any time "inquire into wages or hours or conditions of labor of minors employed in any occupation in this state and determine suitable hours and conditions of labor for such minors." Appellants argue that the statute only authorizes WHC to establish suitable hours of employment, not to prohibit employment altogether. Again, we disagree.

Appellants rely on Ore. Newspaper Pub. v. Peterson, 244 Or 116, 415 P2d 21 (1966), for the proposition that a grant of power to "regulate" does not include

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minors employed as newspaper carriers or vendors. We do not consider the merits of that argument. Assuming, without deciding, that WHC's promulgation of that rule was beyond the scope of its authority, invalidating the rule would have had absolutely no effect on the outcome of this case. For the same reason, we also decline to consider the merits of appellants' attack on former OAR 839-21-107 as being arbitrary. Their claim that the other regulations are also arbitrary is without merit.

the power to "prohibit." The holding in Peterson, however, is not that broad. In Peterson, the legislature had authorized the Board of Pharmacy to "make regulations, necessary for the protection of the public, pertaining to the practice of pharmacy" and to "[r]egulate the practice of pharmacy." Former ORS 689.620. Pursuant to that statute, the Board promulgated a regulation prohibiting the public advertisement of prescription drugs. The Supreme Court held that the regulation exceeded the scope of the enabling statute, because "[n]othing in ORS 689.620 or elsewhere in the same chapter suggests that advertising was contemplated as a proper subject of regulation." 244 Or at 124. The court did not, as appellants argue here, hold that the legislature's use of the term "regulate" prevents an agency from "prohibiting." Rather, the court held

that the power to regulate one area, pharmacy, does not by implication include the power to regulate another area, advertising. In this case, the legislature authorized WHC to determine suitable hours of employment for minors and to promulgate rules regulating those hours. Under that delegation of authority, WHC had the ability to determine that no suitable hours of employment exist for certain minors in certain occupations, and to promulgate rules to that effect.[6]

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[6] Appellants argue that WHC did not conduct a sufficient investigation of employment conditions before promulgating the rules under challenge. However, even assuming that an investigation is a prerequisite to WHC's authority to promulgate rules, see Fund for Animals v. Dept. of Fish & Wildlife, 94 Or App 211, 765 P2d 215 (1988), the investigation in this case was sufficient. As discussed below, the record indicates that WHC held a public hearing at which representatives from the Better Business Bureau, the Multnomah County District Attorney's Office and the Hillsboro Police Department discussed their experiences with minors

Appellants next argue that both courts erred in rejecting their argument that the challenged regulations violate their rights to free speech under Article I, section 8, of the Oregon Constitution and the First and Fourteenth Amendments. Under the Oregon Constitution, commercial speech is afforded the same protection as noncommercial speech. Ackerly Communications, Inc. v. Mult. Co., 72 Or App 617, 696 P2d 1140 (1985), rev dismissed, 303 Or 165 (1987). In City of Hillsboro v. Purcell, 306 Or 547, 761 P2d 510 (1988), the Supreme Court held unconstitutional a city ordinance banning

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selling door-to-door. In addition, WHC officials prepared a report detailing the extent and manner in which major Oregon newspapers use minors in their distribution process.

Appellants also assign error to the Multnomah court's decisions to close the record after the last day of hearings and to exclude testimony regarding the employment practices of newspapers. We conclude that the court did not abuse its discretion in those rulings.

all door-to-door sales of goods in residential areas:

> "The relevant distinction is between outright prohibitions--either criminal or civil--on the one hand, and regulations that do not foreclose expression entirely but regulate when, where and how it can occur. Prohibiting expression by making certain speech or writing criminal, * * * or imposing and oppressive licensing procedure * * * are examples of the former. [A] zoning ordinance [regulating the location of adult bookstores] is an example of the latter. With regard to these latter regulations, even free speech activities `are not immune from regulations imposed for reasons other than the substance of their particular message.' In either case, laws must proscribe harm rather than expression itself." 306 Or at 554. (Citations and footnote omitted.)

The court invalidated the ordinance in Purcell on the ground that it was overbroad under Article I, section 8:

> "The ordinance is overbroad, not because it regulates solicitation for one purpose differently from another, but because it prohibits all solicitation for any purpose at any time. The ordinance as written is broad enough to preclude any person or group form approaching a door in a residential neighborhood

> to solicit financial support for any purpose through the sale of merchandise. This is far more than a regulation limited to and contained by the consequences the law seeks to prevent.
>
> "* * * * *
>
> "The city impermissibly has prohibited all persons from approaching people in their homes at any time to sell merchandise. We do not suggest that the city could not place reasonable limitations on door-to-door solicitations. The city may yet choose to regulate, rather than totally proscribe, door-to-door solicitations. It has not yet done so." 306 Or at 556.

The challenged regulations in this case do not prohibit "all solicitation for any purpose at any time." Rather, they prohibit only door-to-door solicitation by some people (minors under age 16) all of the time and door-to-door solicitation by other people (minors age 16 and older) some of the time. Nothing in the challenged regulations prevents adults from soliciting door-to-door at any time. Similarly, nothing in the challenged

regulations prevents minors age 14 to 16 from soliciting in public places, such as shopping malls. Further, unlike the city ordinance in Purcell, the regulations in this case are not directed toward the content of the speech, but only toward the employment of minors. We conclude, therefore that they do not violate Article I, section 8.

Unlike under the Oregon Constitution, commercial speech under the First Amendment to the United States Constitution is accorded less protection than noncommercial speech. Metromedia, Inc. v. San Diego, 453 US 490, 504-06, 101 S Ct 2882, 69 L Ed 2d 800 (1981); Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 US 557, 562-63, 100 S Ct 2343, 65 L Ed 2d 341 (1980). In Metromedia, the Supreme Court articulated a four-part test for determining the

validity of government restrictions on commercial speech:

> "(1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective." 453 US at 507 (citing Central Hudson Gas & Electric Corp. v. Public Service Comm'n, supra).

We conclude that the challenged regulations meet that test. First, they are directed toward improving the working conditions of minors, which is a substantial governmental interest. Second, they directly advance that interest by prohibiting the employment of some minors under certain conditions and by restricting the employment of other minors under other conditions. Third, they reach no further than necessary to accomplish the governmental interest,

because they permit the employment of minors 16 years of age and older as door-to-door salespersons under certain circumstances, of minors 14 to 16 years of age as salespersons in other circumstances and of adults as salespersons in all circumstances. Accordingly, we hold that the regulations do not violate appellants' rights under the First Amendment.

Appellants next argue that the courts erred in rejecting their argument that the challenged regulations violate their right to equal privileges and immunities under Article I, section 20, and to equal protection under the Fourteenth Amendment. Specifically, they argue that the exemption granted to newspaper carriers and vendors constitutes impermissible class legislation. In order to succeed in their Article I, section 20, challenge, appellants must show, (1) that another group has been granted a "privilege" or

"immunity" that their group has not been granted, (2) that the regulations discriminate against a "true class" on the basis of characteristics that they have apart from the regulations themselves and (3) that the distinction between classes either is impermissibly based on persons' immutable characteristics and reflects "invidious" social or political premises or has no rational foundation in light of the enabling statute's purposes.[7] Jungen v. State of Oregon, 94 Or App 101, 105, 764 P2d 938 (1988).

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[7] Respondent argues that NWA does not have standing to assert a violation of rights under Article I, section 20, because those rights extend only to "citizens" and NWA, as a corporation, is not a "citizen." See State v. James, 189 Or 268, 219 P2d 756 (1950); but see Salem College & Academy, Inc. v. Emp. Div., 298 Or 471, 488 n 13, 695 P2d 25 (1985). Because we conclude that any rights NWA might have under Article I, section 20, were not violated, we need not resolve that issue. In any event, the other appellants clearly have standing to assert a violation of that constitutional provision.

Former OAR 839-21-107 provided that minors employed as newspaper carriers and newspaper vendors were not subject to the administrative regulations promulgated under ORS 653.305.[8] Exemption from regulation is clearly an immunity to which Article I, section 20, analysis applies. Thus, the first element is satisfied. In addition, newspaper carriers and vendors are a "true class" in the sense that they are identified in the regulation by characteristics which they have apart from the regulation itself, i.e., the sale and distribution of a particular product. See State v. Clark, 291 Or 231, 240-41, 630 P2d 810, cert den sub nom Clark v. Oregon, 454 US 1084 (1981). Thus, the second element is also satisfied. However, the classification is not based on immutable

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[8] Minors employed "at domestic work and chores in or about private residences" were also exempted under that regulation.

characteristics reflecting invidious social or political premises. Any person wishing to come within the favored class of newspaper carriers and vendors may do so by engaging in that occupation. Accordingly, the first prong of the third element is not present. The only remaining question, then, is whether the classification lacks a rational foundation in the light of the statute's purposes. Jungen v. State of Oregon, supra, 94 Or App at 105.

Appellants argue that there is no rational distinction between the distribution of newspapers and the distribution of household products or candy. The Bureau's regulation of the door-to-door sales of candy and other products is based on its determination that that particular activity by minors is sufficiently dangerous to require additional regulation. That determination

is supported by the record. Bureau officials testified in these cases that, before promulgating the challenged regulations, they had received intensifying complaints from the public and from parents about young children selling products door-to-door in the Portland and Salem areas. The complaints were that the children were working very late at night, that they were sometimes abandoned far from their homes and that they were also sometimes transported to Washington without their parents' permission. The officials testified that no similar complaints were received regarding newspaper carriers or newspaper vendors.[9] In addition, the Bureau

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[9] Bureau officials testified that they had received complaints about newspaper carriers and vendors "from time to time" in the past, but that the complaints that prompted the challenged regulations all involved sales of household products and candy.

conducted a public hearing at which representatives of the Better Business Bureau, the Multnomah County District Attorney's office and the Hillsboro Police Department discussed their experiences with minors selling door-to-door. Again, no complaints about newspaper carriers or newspaper vendors were received. We conclude that the exemption of newspaper carriers and vendors in OAR 839-21-107 had a rational basis in the light of the enabling statute's purpose of promoting safe working conditions for minors.

Appellants also argue that OAR 839-21-107 violates their rights to equal protection under the Fourteenth Amendment. They assert that the challenged regulations should be subjected to strict scrutiny because they address fundamental rights to engage in commercial speech and to engage in a particular occupation. However, as discussed supra, we conclude

that the challenged regulations are permissibly directed at the employment of certain minors in certain occupations, not at the content of their speech. Further, a minor's right to be employed as a door-to-door salesperson during certain hours or at a certain age is not a fundamental right for purposes of equal protection clause cf the Fourteenth Amendment. Cf. New Orleans v. Dukes 427 US 297, 96 S Ct 2513, 49 L Ed 2d 511 (1976) (right to be employed as a pushcart vendor is not a fundamental right). Because no fundamental interests are addressed by the challenged regulations, they need only have a rational basis to withstand Fourteenth Amendment scrutiny. We conclude that, for the same reasons stated in our analysis of Article I, section 20, the challenged regulations are rationally related to the purposes of the enabling statute.

Appellants next argue that the Multnomah court erred in granting the state's request for a permanent mandatory injunction requiring them to comply with the challenged regulations. They argue that the Bureau does not have authority to seek injunctive relief, or in the alternative, that injunctive relief was not appropriate in this case.[10] ORS 651.050 authorizes the Commissioner to "cause to be enforced * * * all laws

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[10] Appellants also argue that injunctive relief was improper because one of the regulations that they were charged with violating is unconstitutionally vague. That regulation, OAR 839-21-265(13), provides that the return transportation of a minor shall "occur no later than 9:00 o'clock at night." They argue that, under the quoted language, it is unclear whether the transportation must end or begin by 9:00 o'clock. However, OAR 839-21-265(12) provides that minor door-to-door peddlers "shall not be employed past the hour of 9:00 o'clock at night." When read in conjunction with that regulation, the plain meaning of OAR 839-21-265(13) is clear: transportation is part of employment, and employed minors must be returned home by 9:00.

regulating the employment of minors [and] all laws enacted for the protection of employees." ORS 653.535 authorizes WHC to "take such steps as may be necessary to prosecute such employers as are not observing or complying with its orders." Implicit in those broad grants of authority is the ability to seek injunctive relief.

Appellants' assertion that injunctive relief is not appropriate under the circumstances of this case is meritless. NWA was charged with 91 separate and continuing violations of the regulations, 75 of which a hearings officer held violated these regulations. Civil penalties of over $45,000 were assessed. On the record before us, we agree with the Bureau that NWA's conduct was not an isolated event, but rather a pattern of misconduct affecting the minors that it employed. The remedy suggested by NWA,

case-by-case enforcement of the regulations, would not only be a waste of judicial and administrative resources, but would not address the broad problem of continued child labor violations. Injunctive relief was therefore proper.

Appellants also argue that the Marion court erred by granting summary judgment in favor of the state and by refusing to grant their own cross-motion for summary judgment. They argue that summary judgment is inappropriate in cases involving constitutional issues and that, in any event, there were material issues of fact. Summary judgment is proper when:

> "the pleadings, depositions, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ORCP 47C.

In reviewing a summary judgment, the record is viewed in the light most favorable to the party opposing the

motion. Seeborg v. General Motors Corporation, 284 Or 695, 699, 588 P2d 1100 (1978). The constitutionality of statutes or ordinances may properly be determined on summary judgment. See Schaumburg v. Citizens for Better Environment, 444 US 620, 100 S Ct 826, 63 L Ed 2d 73 (1980).

We conclude that summary judgment was properly granted. The material facts in the Marion County action were not in dispute. Unlike the Multnomah County action, where the issue of appellants' conduct was central, the questions presented in the Marion County action were purely legal. Accordingly, once the court had determined that appellants' constitutional challenges were meritless, the state was entitled to judgment as a matter of law.[11]

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[11] Appellants' remaining assignments of error are without merit.

Affirmed.

* * *

Petitioners petitioned for review in the Oregon Supreme Court, and said petition was denied on August 29, 1989 as follows:

IN THE SUPREME COURT
OF THE STATE OF OREGON

NORTHWEST ADVANCEMENT INC MARK, NANCY LOUISE DOW, TANYA SUE Petitioners ROBERTS, MARY WENDY Respondent BUREAU OF LABOR & INDUSTRIES WAGE AND HOUR COMMISSION Respondent v. STATE OF OR, BUREAU OF LABOR Respondent NORTHWEST ADVANCEMENT INC HENKE, JEFF GEER, JOE COX, TIM Petitioners	ORDER DENYING REVIEW CA A41042 SC S36259

The Court has considered the petition for review and ORDERS that it be denied.

DATE: August 29, 1989.

/s/ Edwin J. Peterson
EDWIN J. PETERSON
CHIEF JUSTICE

Petitioners petitioned for reconsideration of the Supreme Court's order denying review, and said petition was denied on November 16, 1989 as follows:

IN THE SUPREME COURT
OF THE STATE OF OREGON

NORTHWEST ADVANCEMENT, INC. and NANCY LOUISE MARK, Guardian ad litem for TANYA SUE DOW, Petitioners on Review, v. STATE OF OREGON, Bureau of Labor, Wage and Hour Division, Respondent on Review.	ORDER DENYING RECONSID-ERATION CA A41042 SC 36259
STATE OF OREGON, ex rel MARY WENDY ROBERTS, Commissioner of the Oregon Bureau of Labor and Industries, and the WAGE AND HOUR COMMISSION of the State of Oregon, Respondents on Review, v. NORTHWEST ADVANCEMENT, INC. JEFF HENKE, JOE GEER, and TIM COX, Petitioners on Review.	

The Court has considered the petition for reconsideration and ORDERS that it be denied.

. . .
. . .

DATE: November 16, 1989

/s/ Edwin J. Peterson
EDWIN J. PETERSON
CHIEF JUSTICE

* * *

Finally, Petitioners applied for an extension of time to file the petition for certiorari in this court, and it was granted as follows:

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SUPREME COURT of the UNITED STATES

No. A-536

Northwest Advancement, Inc., et al.,

Petitioners

v.

Oregon Bureau of Labor, Wage and Hour Division, et al.

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including March 16, 1990.

/s/ Sandra D. O'Connor
Associate Justice of the
Supreme Court of the
United States